BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

WILMA LONG Claimant VS. **RIGHT AT HOME** Respondent AND **COMMERCE & INDUSTRY INS. CO.** Insurance Carrier	)	Docket No. 1,039,167

ORDER

STATEMENT OF THE CASE

Respondent and its insurance carrier (respondent) requested review of the August 5, 2008, preliminary hearing Order entered by Administrative Law Judge John D. Clark. Dale V. Slape, of Wichita, Kansas, appeared for claimant. Jodi J. Fox, of Kansas City, Kansas, appeared for respondent.

The Administrative Law Judge (ALJ) found that claimant was injured out of and in the course of her employment with respondent and ordered respondent to pay her medical treatment with Dr. Charles Pence, as well as medical mileage. Respondent was also ordered to pay temporary total disability benefits at the rate of $130 per week until claimant is released.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the July 29, 2008, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Respondent requests review of whether the ALJ exceeded his jurisdiction in granting medical and temporary total disability benefits and whether claimant's alleged injury arose out of and in the course of her employment, arguing that instead, claimant's injury occurred from a risk that was personal to her.

Claimant argues that her injury was not caused by an activity of ordinary daily living but was caused by an activity that was unique to her job setting. Accordingly, she argues her injury arose out of and in the course of her employment with respondent.

The issue for the Board's review is:

(1) Did claimant's injury arise out of and in the course of her employment with respondent?

(2) Did the ALJ exceed his authority or jurisdiction in granting claimant benefits?

FINDINGS OF FACT

Claimant was employed by respondent as a certified nurse's aide. On December 21, 2007, she was injured while assisting a client prepare for lunch. Claimant had finished dressing the client, and the client was sitting on her bed with her walker in front of her. Claimant noted that the client's shirt was not laying right, so she leaned over the walker to straighten the shirt. When she did that, she twisted her back to the left and heard a loud pop. She was able to straighten up, and she took the client to lunch.

The accident occurred on a Friday. She tried to work the next Monday but could not do the job because of her back pain. She reported the injury to the respondent that day. Respondent told her to go to her own doctor, so she went to see Dr. Pence on January 3, 2008. Later, respondent authorized Dr. Doug Burton as her treating doctor. However, claimant requested that Dr. Pence be authorized to treat her, since he had performed previous surgeries on her back, including one in which a rod was placed in her back.

Claimant admits she did not report to respondent or her doctors that she was leaning over a walker when she heard the pop in her back. Her report to respondent and her doctors was only that she had leaned over to straighten out a client's shirt and heard a pop. She testified she did not realize she needed to be that specific about the incident.

Claimant had a work-related injury on August 6, 2007, and had been seen for that injury by Dr. Pence on November 15, 2007. Dr. Pence indicated that claimant had multiple previous spine injuries, including a long fusion from T7 to the sacrum. Although claimant testified that on November 15, 2007, Dr. Pence said her rod had possibly been cracked, nothing in the medical record of that date corroborates that statement. Dr. Pence's January 3, 2008, medical note indicates that claimant's injury of August 2007 had resolved and she now had a new injury. He again saw claimant on January 24, 2008, at which time he had an x-ray taken and discovered that claimant had a broken rod in her back. He was not sure, however, that the broken rod was the cause of her pain.

Claimant's care was transferred to Dr. Doug Burton, who saw her on June 13, 2008. His report includes a history of three previous back surgeries, the first being in 1969, an

L5-S1 fusion. In 1997 claimant underwent an anterior L1-L5 instrumentation and fusion, and in 2006 she underwent a redo instrumentation and fusion from her upper thoracic spine to her pelvis. In December 2007, claimant felt a pop in her back, a subsequent x-ray showed she had a broken rod, and she has had severe back pain since. Dr Burton's physical examination showed she had two broken rods in her back. He diagnosed her with pseudoarthrosis and pain status post previous T6 to pelvis instrumentation. He recommended surgery.

Claimant was seen by Dr. Michael Munhall on July 30, 2008, for an independent medical opinion, at the request of claimant's attorney. Dr. Munhall took a history from claimant about her injuries on August 6, 2007, and December 21, 2007. Claimant said her injuries from the August 2007 incident had resolved. Concerning her claim of injury in December 2007, claimant told Dr. Munhall that she reached over a walker while trying to rearrange the blouse of a client and in so doing, bent and rotated to her left. She described a popping followed by a sharp left thoracolumbar paraspinal area pain. Dr. Munhall opined that claimant's left thoracolumbar spine pain was caused by the work-related injury sustained on December 21, 2007.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[1] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[2]

K.S.A. 2007 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2007 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

---

[1] K.S.A. 2007 Supp. 44-501(a).

[2] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

> The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.[3]

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[4] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[5] An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.[6]

K.S.A. 2007 Supp. 44-508(e) states:

> (e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

In *Hensley*[7], the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character.

---

[3] *Id.* at 278.

[4] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[5] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

[6] *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

[7] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

In *Anderson*,[8] the Kansas Court of Appeals stated:

> Personal risks include those associated either with natural aging or normal day-to-day activity. Where an employment injury is clearly attributable to a personal condition of an employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. But where an injury results from the concurrence of some preexisting personal condition and some hazard of employment, compensation is generally allowed.
>
> An injury arises out of employment if the injury is fairly traceable to the employment and comes from a hazard the worker would not have been equally exposed to apart from the employment.
>
> A manifestation of force is not necessary for an incident to be deemed an "accident" under K.S.A. 44-508(d).

The Kansas Court of Appeals, in *Johnson,*[9] held:

> In an appeal from the final order of the Workers Compensation Board awarding compensation for an injury suffered by an employee at the workplace, under the facts of this case substantial evidence did not support the board's finding that the employee's act of standing up from a chair to reach for something was not a normal activity of day-to-day living.

The court found it significant that "Johnson had a history of three or four [prior] incidents of left knee pain. Her treating physician, Dr. Jennifer Finley, testified that '[i]t looks like she had had years of degeneration and had some previous problems, and it was just a matter of time.'"[10]

The Kansas Court of Appeals, in *Lietzke*,[11] stated:

> The evidence in this case clearly established that one of the hazard's [*sic*] of Lietzke's employment was prolonged standing necessary to perform his welding

---

[8] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, Syl. ¶¶ 5, 6, 8, 61 P.3d 81 (2002).

[9] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 3,147 P.3d 1091, *rev. denied* 281 Kan. _ _ (2006).

[10] *Id.* at 788. See also *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[11] *Lietzke v. True-Circle Aerospace*, No. 98,463, unpublished Court of Appeals case filed June 6, 2008, slip op. at 20-21; see also *Heller v. Conagra Foods, Inc.*, No. 96,990, unpublished Court of Appeals case filed June 22, 2007.

job. This prolonged standing caused or aggravated Lietzke's hip and groin injuries. Prolonged standing is not a normal activity of day-to-day living.

The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.[12]

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[13] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[14]

ANALYSIS

Although standing, sitting, bending, reaching, lifting and twisting are all activities that can be described as normal activities of day-to-day living, K.S.A. 2007 Supp. 44-508(e) does not exclude "accidents" that are the result of such activity, but rather excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. In this sense, it is another way of excluding personal risks from coverage under the Workers Compensation Act.

The Board has long concluded that the exclusion of disabilities resulting from the normal activities of day-to-day living from the definition of an injury was an intention by the Legislature to codify and strengthen the holding in *Boeckmann.*[15]

The court in *Boeckmann* distinguished from its holding those cases where "the injury was shown to be sufficiently related to a particular strain or episode of physical exertion" to support a finding of compensability.[16] Similarly, the court in *Johnson* distinguished its holding from cases where the injury is "fairly traceable to the employment."[17] This Board Member concludes that the Legislature did not intend for the "normal activities of day-to-day living" to be so broadly defined as to exclude disabilities caused or aggravated by the strain or physical exertion of work.

---

[12] *Harris v. Bethany Medical Center*, 21 Kan. App. 2d 804, 805, 909 P.2d 657 (1995).

[13] K.S.A. 44-534a; see *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[14] K.S.A. 2007 Supp. 44-555c(k).

[15] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[16] *Id.* at 737.

[17] *Johnson v. Johnson County*, 36 Kan. App. 2d 786, 147 P.3d 1091, *rev. denied* 281 Kan. __ (2006).

In this case, no doctor said claimant's back condition was such that almost any activity would have caused this injury or that the injury would have occurred whether claimant had been working or not, as was the testimony in *Boekmann* and *Johnson*.

Furthermore, in this case, there is expert medical testimony that claimant's bending and reaching at work aggravated claimant's low back condition or caused her symptoms. In addition, there is evidence that claimant's job duties required more bending, twisting and turning than what is normal for her, and that such activity aggravated her preexisting back condition.

This Board Member concludes that claimant's accident and current need for treatment are directly attributable to her work. Although her injury may be an aggravation of a preexisting condition, it did not result from a personal risk. K.S.A. 2007 Supp. 44-508(e) excludes injuries where the "disability" is a result of the natural aging process or the normal activities of day-to-day living. But both *Boeckmann*[18] and *Johnson*[19] distinguished from their holdings cases as compensable where the injury is related to a particular strain or episode of physical exertion or is fairly traceable to the employment.

Again, it is a significant factual distinction from this case that in *Boeckmann* and *Johnson* there was testimony that the disability would have occurred whether claimant had been working or not. In this case, there is no such testimony from a doctor that claimant's back condition was such that any activity would have caused the injury whether claimant was working or not.

The undersigned Board Member affirms the ALJ's determination that claimant met her burden of proof to establish that she suffered a compensable work-related aggravation of her preexisting back condition.

CONCLUSION

Claimant suffered personal injury by accident on December 21, 2007. Her accident and injury arose out of and in the course of her employment with respondent. Accordingly, the ALJ did not exceed his jurisdiction in awarding claimant preliminary benefits.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge John D. Clark dated August 5, 2008, is affirmed.

---

[18] *Boeckmann*, 210 Kan. 733.

[19] *Johnson,* 36 Kan. App. 2d 786.

IT IS SO ORDERED.

Dated this _____ day of October, 2008.

_____
HONORABLE DUNCAN A. WHITTIER
BOARD MEMBER

c: Dale V. Slape, Attorney for Claimant
Jodi J. Fox, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge